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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1072

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners,*

v.

WILSON P. LOCKRIDGE, *Respondent.*

On a Writ of Certiorari to the Supreme Court of the State of Idaho

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The most recent opinion of the Supreme Court of the State of Idaho is reported at 93 Idaho 294, 460 P.2d 719 (1969), and is set out at A. 89. Its earlier opinion, reversing and remanding for trial, is reported at 84 Idaho 201, 369 P.2d 1006 (1962) and is set out at A. 27.

The Memorandum Decisions of the Idaho District Court are not reported. The following are printed

in the Appendix: April 7, 1961, granting the Motion to Dismiss on pre-emption grounds (A. 22); December 21, 1962, striking defendants' defense on the merits and holding that the provisions of the dues delinquency clause of the International Union Constitution and the union-security clause of the collective bargaining agreement were unambiguous (A. 36); June 21, 1966, on the merits after trial (A. 49); and September 1, 1966, on the Motions to Amend the Findings of Fact and Conclusions of Law (A. 54). The District Court's Findings of Fact and Conclusions of Law, as amended, of September 1, 1966, are set out at A. 56.

JURISDICTION

The judgment and decision of the Supreme Court of the State of Idaho was entered on October 15, 1969. A petition for a writ of certiorari to the Supreme Court of Idaho was filed in this Court on January 13, 1970. This Court granted the petition on March 30, 1970. 397 U.S. 1006. This Court has jurisdiction to review the judgment herein by a writ of certiorari pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Supremacy Clause of the United States Constitution—Article VI, Section 2—and of the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.* ("Act") —Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 157, 158(a)(3), 158(b)(1)(A), 158(b)(2)— are set out in the Statutory Appendix to this Brief, p. 1a, *infra*. The relevant statutory provisions are also set out at pp. 28-30, *infra*.

QUESTION PRESENTED

Can a State Court assert jurisdiction over union conduct which is so regulated by the Congress under the National Labor Relations Act as to be certainly either protected activity or an unfair labor practice—causing an employee's discharge pursuant to a union-security clause in a collective bargaining agreement, by advising the employer that the employee was no longer a member of the union in good standing because he had failed to tender timely the periodic dues uniformly required as a condition of retaining union membership?

STATEMENT OF THE CASE

The Union Conduct

On or about May 16, 1943, Respondent Lockridge, a citizen of Idaho, was employed as a bus driver by the Greyhound Corporation, Western Greyhound Lines or one of its predecessors ("Greyhound"). Throughout the period of his employment, the terms and conditions of that employment were governed by collective bargaining agreements between Greyhound and Petitioner Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("Union").[1] These collective bargaining agreements included a union-security provision requiring all employees to remain members of the Union as a condition of employment. Additionally, they contained a check-off clause which permitted the employees to have their Union dues deducted from their compensation by Greyhound. Lockridge maintained this authorization and via the check-

[1] The other Petitioner, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, is referred to herein as "International Union".

off maintained the Union membership condition of his employment, until 1959.

On or about August 11, 1959, however, Lockridge terminated his check-off authorization (A. 75, 80), thereby undertaking to maintain his Union membership in good standing on his own initiative so as to retain his employment. Lockridge was aware he had this responsibility. A. 76. On August 20, 1959, the Union requested that he reinstate his check-off authorization, specifically pointing out that the International Union Constitution provided in pertinent part, "[w]here agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears *one month* may be suspended from membership and removed from employment, in compliance with terms of the agreement." A. 79.[2] This Union letter concluded, "In the event you do not maintain your membership in Division 1055 as specified above, we will be required to have you dismissed from service with Greyhound." A. 80.

Nevertheless, Respondent Lockridge elected not to restore his dues check-off authorization; and he promptly permitted himself to become in arrears in his dues payments. As a consequence of his revocation of his check-off authorization, Greyhound had returned to him, and the Union had returned to Greyhound, the amount which had been checked off for his September, 1959 dues (A. 75, 80-81); and he neglected to pay the dues for that month by October 1, 1959, thereby becoming in arrears. Prior to November 1, 1959, the Union notified Lockridge that he was required to pay his September and October dues by

[2] Emphasis added. Emphasis is added and footnotes are omitted in quotations throughout this Brief, unless otherwise specified.

November 1, 1959, or he would be considered in arrears and thus subject to dismissal. A. 73, 80-81.

Despite this notice, Lockridge did not bring his dues payments up to date by November 1, 1959. He failed to pay his October dues by that date. Thereby, in Petitioners' view, he became delinquent in his Union dues payment and surrendered his membership in the Union and, accordingly, rendered himself liable to discharge from his employment. Consequently, the Union requested Geyhound to discharge him because he was no longer a member of the Union as the collective bargaining agreement required. A. 82. Pursuant to this Union request, Greyhound discharged him, on or about November 3, 1959. A. 86.

At the same time and for the identical reason, the Union caused Greyhound to discharge another one of its bus drivers, Elmer J. Day, a citizen of Oregon. See pp. 55-58, *infra*. Day's case was before this Court in No. 301, O.T. 1964, *Elmer J. Day, Petitioner* v. *Northwest Division 1055, etc., et al., Respondents.* The Supreme Court of Oregon had reversed the trial court's award of substantial damages, relying for this holding upon the pre-emption decisions of this Court (238 Ore. 624, 389 P.2d 42 (1964)), and this Court denied certiorari (379 U.S. 878 (1964)).

Both Day and Lockridge felt that the Union had unlawfully procured their discharge from their employment as Greyhound bus drivers; they took the position that they had maintained their Union membership by timely dues payments. The first action against the Union was a Charge filed by Day with the National Labor Relations Board, alleging that the Union had violated §§ 8(b)(1) and (2) of the Act in procuring his discharge. After investigation, the

Regional Director of the Board dismissed the Charge because there was "insufficient evidence of violations * * *." A. 14. Thereafter, Day brought his suit in the Oregon Courts.

Lockridge never made any application to the Board or contacted it in any way. A. 76. The only explanation he could give for this failure was that he had "heard" that the Board did not have jurisdiction, he could not recall from whom, about a week after he was removed from employment. *Ibid.*

Inception of Suit and Successive Complaints

Rather than submit himself to the Federal forum, Respondent Lockridge filed suit in the Idaho State District Court at Boise, in September, 1960, against the Union and the International Union, which are the Petitioners herein, and also the Greyhound Corporation. The basic allegation, which remained throughout the litigation,[3] was that Petitioner Unions "have deprived [him] of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience * * *." A. 7, 18, 47.

The original Complaint (A. 4-11) had four Counts. Count One was the basic one sounding in the tort of unlawful interference with employment; damages and punitive damages were sought on this Count against all defendants including the Company. Count Two sought the identical damages from the Unions only

[3] In addition to the original Complaint, Lockridge filed an Amended Complaint on February 15, 1961 (A. 14), and a Second Amended Complaint (A. 43), upon which trial was had, on March 31, 1965.

and alleged a violation of the Union rules in the procurement of Lockridge's discharge. Count Three, likewise directed only against the Unions, sounded in conspiracy, in essence "that as a result of differences arising through the internal management of the International Association and Division 1055, officers of the International Association and officers and agents of Division 1055 desired to punish the plaintiff and make an example of him and deter other members of the union from asserting their true and lawful rights under the constitution and general laws of the International Association and for the purpose of coercing and intimidating other members of the union conspired, determined and agreed to make example of the plaintiff by seeking and obtaining his discharge from employment [and] thereby discriminated against plaintiff as a member of the union." A. 9. Count Four alleged that Greyhound had been negligent in simply accepting and not investigating the Union's notice that Respondent Lockridge was delinquent and in discharging him.

The only specified relief Lockridge prayed for was money damages. He sought $212,200 in actual damages, and persisted in this throughout the litigation. A. 11, 22, 48. In addition, he sought $50,000 in punitive damages, but this was dropped in the Second Amended Complaint. A. 48. The amount of actual damages was computed on the theory that Lockridge was entitled to recover a lifetime income because his discharge at Union request had rendered him permanently unemployable. This theory is reflected in the following paragraph of the Complaint (A. 7) which remained in both Amended Complaints (A. 18, 46):

> "That at the time of his discharge from employment as aforesaid, plaintiff was 46 years of

> age, earning in his employment an average of approximately $7,200.00 per year and with his seniority status, barring unforeseen death or disablement, would be able to earn in the future for the next 20 years and until he became 65 years of age, in excess of $7,200.00 per year, and additionally, at the age of 65 years would have been able to retire with retirement pay of approximately $3,600.00 per year."

After the filing of motions to dismiss based upon pre-emption, but prior to the decision on those motions, Lockridge filed an Amended Complaint which dropped Greyhound as a party defendant. This First Amended Complaint (A. 14-22) included the first three Counts of the original Complaint, now demanding recovery only from the Unions: Count One, the tort of unlawful interference with Lockridge's employment; Count Two, violation of the "contract" between the member and the Union; and Count Three, conspiracy and malicious action.

Subsequent to the first Idaho Supreme Court decision and prior to trial, Lockridge filed a Second Amended Complaint (A. 43-48) which excised Count Three and the prayer for punitive damages.

In his Amended Complaints, Lockridge alleged that the Unions had deprived him of his employment wrongfully in that he "was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of [the Union officer] aforesaid [in advising Greyhound he was delinquent thus causing his discharge] were wrongful and without any lawful basis." A. 17, 46.

While avoiding the use of the words "to discriminate" and "not uniformly required" which appear on

the face of Section 8(b)(2) of the Act, 29 U.S.C. §158(b)(2), quoted pp. 1a, 28, *infra,* Lockridge in both Amended Complaints alleged that "it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof" and that the Union had acted against him "in a manner never before indulged in." A. 18, 46-47.

District Court Dismissal, Idaho Supreme Court Reversal, on Pre-Emption

Throughout the case, the principal contention of the Petitioner Unions was that the subject matter of Lockridge's action was pre-empted by the Act and that the State Court was thereby deprived of jurisdiction. This issue was raised at the outset by a motion to dismiss alleging the Union conduct complained of was subject to exclusive Board jurisdiction under the Act. A. 12. Relying primarily upon *San Diego Unions* v. *Garmon,* 359 U.S. 236 (1959), the Idaho District Court granted the motion and dismissed on this Federal ground. A. 22. The nub of the Court's conclusion was that "plaintiff is asserting an unlawful labor practice, because he is seeking damages based upon *injuries to his employment,* as distinguished from damages based *upon injury to his rights as a union member.*" A. 25 (emphasis in original).

The Supreme Court of Idaho reversed and remanded for further proceedings, however, asserting that the Federal law was in an "unsettled state" and therefore "[w]e must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' nor 'pre-

empted' by federal law, or, more appropriately, by the National Labor Relations Board." A. 34.[4]

That decision discussed and purported to be confused by this Court's decisions, *Machinists* v. *Gonzales*, 356 U.S. 617 (1958) ("*Gonzales*"), and *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959) ("*Garmon*"). It was rendered before *Plumbers' Union* v. *Borden*, 373 U.S. 690 (1963) ("*Borden*") and *Iron Workers* v. *Perko*, 373 U.S. 701 (1963) ("*Perko*"). Indeed, the Court below, for support of its 1962 judgment, *inter alia*, relied upon *United Association of Journeymen, etc.* v. *Borden*, 160 Tex. 203, 328 S.W.2d 739 (1959) and *Perko* v. *Local No. 207 of Int. Ass'n of Bridge, etc., Workers*, 171 Ohio St. 68, 167 N.E.2d 903 (1960) (A. 35), which were, of course, reversed by this Court in *Borden* and *Perko*.[5]

Subsequent District Court Proceedings

After the decision by the Idaho Supreme Court, Respondent Lockridge maintained his First Amended Complaint, again electing to seek damages only and

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[4] A petition for certiorari was not filed after the 1962 decision. *Cf. Building Union* v. *Ledbetter Co.*, 344 U.S. 178 (1952); *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), which was subsequent to this Idaho Supreme Court decision.

[5] Prior to the trial, Petitioners filed a Motion to Dismiss, based upon *Borden* and *Perko*, which had been decided subsequent to the 1962 decision of the Court below. When the District Court denied the Motion, Petitioners moved the Supreme Court of Idaho for a writ of mandate to compel the District Court to dismiss the action on the ground that it lacked jurisdiction, in the light of *Borden* and *Perko*. In October, 1963, that Court "denied petitioners' petition for writ of mandate on the ground that the question is prematurely presented and petitioners have an adequate remedy by appeal, therefore, mandate is not available." Idaho Supreme Court No. 9393, Order of October 1, 1963. Accordingly, the issue was preserved and presented by way of appeal.

not to request restoration to Union membership; and Petitioners answered on the merits. They asserted, *inter alia,* that Lockridge had failed and refused to pay his dues as required by the Union Constitution, and was consequently discharged in accordance with the collective bargaining agreement. Lockridge moved to strike this defense, and the District Court granted the motion, asserting "that the provisions of the general constitution and the agreement with Greyhound are so clear and unambiguous that they require no interpretation, and that their correct interpretation is as plaintiff contends." A. 36.[6]

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[6] Although it is not clear on the face of the District Court Memorandum Decision, the basis for this holding is no more and no less than the differences in wording between "member in good [financial] standing" and "member." The pertinent provision of the Union Constitution, Section 91 (quoted in the opinion below, A. 92), provides that members are not delinquent in dues until they are in arrears over two months, except that "[w]here agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with terms of the agreement." The collective bargaining agreement applicable to Respondent provided that employees "shall remain *members* as a condition precedent to continued employment." According to the State Courts, Petitioners' conduct was unlawful because the International Union Constitution provided for one rather than two months arrearages only where the collective bargaining agreement required that employees must be "members * * * in continuous good financial standing," whereas this agreement provided only that they must be "members"; it did not use the entire phrase from the International Union Constitution, nor did it use a phrase such as "member in good standing." A. 50-51, 60, 64, 92.

In fact, the collective bargaining agreement applicable to Respondent was one of a series of different contracts, applicable respectively to the different groups of employees who had been acquired at various different times by Greyhound. In all of these but the one agreement, the union-security clause read, "shall, as

Subsequently, Petitioners sought leave to file Amended Answers, and accompanying Affidavits, to demonstrate that the consistent practice of the parties and their consistent interpretation of the pertinent collective bargaining agreement and International Union Constitution provisions did establish that Respondent was delinquent and therefore properly discharged from employment. A. 37-42. But the District Court denied leave upon the basis of its previous holding that there was no ambiguity. While persisting in the view that they acted lawfully and completely in accord with the pertinent collective bargaining agreement and Constitutional provisions, and that the Board would therefore have brought no complaint against them had Lockridge submitted his claim to it, Petitioners thereafter did not challenge this ruling.

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a condition of continued employment, maintain such membership *in good standing*." The thrust of the affidavits proffered by Petitioners from representatives of both the Union and Greyhound was that this difference in contractual language was inadvertent and was not ever intended or applied to produce any differences in practical results, under either the International Union Constitution or the administration and application of these agreements. A. 37-42.

As a matter of law, there is no difference between requiring "membership" and requiring "membership in good faith" for under the Act the member's only obligation in any event is to tender the periodic dues uniformly required as a condition of retaining membership. "As established in the *Radio Officers* case [*Radio Officers* v. *Labor Board*, 347 U.S. 17 (1954)], the 'membership' referred to in § 8(a)(3) and thus incorporated in § 8(b)(2) is broad enough to embrace participation in Union activities and maintenance of good standing as well as mere adhesion to a labor organization. 347 U.S. at 39-42." *Plumbers' Union* v. *Borden*, 373 U.S. 690, 695 (1963).

After a trial which was devoted almost entirely to the issue of damages,[7] but at which Petitioners renewed their motions based on pre-emption, the District Court issued a Memorandum Decision (A. 49) and also preliminary Findings of Fact and Conclusions of Law which were amended and finalized after the parties had requested various amendments, and the Court had issued another Decision thereon. In its basic Memorandum Decision, the District Court made clear it still believed that the case was pre-empted, and that *Borden* and *Perko* had "greatly reinforced" Petitioners' position (A. 52); and, further, that the Board plainly had jurisdiction over Lockridge's claim and that he was "partially at fault for his predicament because he did not pursue" the Board remedies available to him under the Act. A. 53-54. Nevertheless, the District Court regarded itself constrained to proceed because of the initial decision of the Idaho Supreme Court. A. 52. The District Court found that Petitioners had treated Respondent as a dues delinquent under circumstances when it would have regarded others as good standing members (A. 60-61, 64-65); that they had caused Respondent's discharge by advising Greyhound of his

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[7] In accordance with his theory that he was entitled to a lifetime of earnings as damages, plaintiff, as part of his case, offered and obtained a stipulation that "the Court may take judicial notice of the mortality tables in volume III of the [Idaho] Code, to use if necessary in this case for projecting Mr. Lockridge's life expectancy[.]" Court Reporter's Transcript, page 227, lines 15-19; stipulation made and received by the District Court, *id.* at lines 26-27. One of the District Court's Findings was that "[p]laintiff's life expectancy at time of trial is approximately 23 years." A. 63.

dues delinquency and had thus damaged him;[8] and it awarded damages of approximately $32,000, measured primarily by the earnings of the driver who stood just below Lockridge on the Greyhound job seniority roster at the time of Lockridge's discharge. A. 62, 66.

Further, while recognizing that "plaintiff did not seek such a remedy" the District Court awarded him "full restoration" of Union membership. A. 66. In his motions addressed to the preliminary Findings and Conclusions, Lockridge requested the District Court to direct that this restoration should be with full seniority. Astonishingly, Lockridge sought this relief from the State Court on the ground that it was routinely provided in such cases by the Board. A. 55. The District Court denied this request precisely on the ground that "seniority" involved the *employment* relationship. It held that granting any such relief would "clearly be in excess of [the State Court's] jurisdiction because it would be invading a field which clearly is within the exclusive jurisdiction of the N.L.R.B. and plaintiff runs head on into the 'Borden' and 'Perko' decisions." *Ibid.*

Decision Below

Petitioners' appeal to the Supreme Court of Idaho, based solely on pre-emption, was rejected in a 4-1 vote.

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[8] The pertinent Conclusion of Law was "That while the acts of defendants' officers and agents in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted the same, such acts were nevertheless wrongful and *resulted in a wrongful interference with plaintiff's employment, occupation and livelihood* and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish." A. 66.

On Lockridge's cross-appeal, the Idaho Supreme Court added to his damages and directed he be restored with full seniority. As the majority and dissenting opinions demonstrate (A. 89, 111), the Court below was divided on whether the pre-emption principles declared by this Court, particularly in *Garmon, Borden* and *Perko,* deprived it of jurisdiction. The dissenting Judge sought to honor those decisions enforcing pre-emption principles; but the majority upheld Idaho State Court jurisdiction, even though (1) it paid lip service to the pre-emption principle established by this Court that the State Courts lacked jurisdiction over union conduct which was even "arguably" an unfair labor practice (A. 102-105); *and* (2) it held that the Union conduct involved was "most certainly" an unfair labor practice subject to the jurisdiction of the Board under the Act. A. 98.[9] In essence, the majority held, and the dissent denied, that this case could be insulated from the pre-emption decisions of this Court because it involved only Lockridge's Union membership and did *not* sufficiently involve his employment relationship. The opinions of the Court below are discussed at pp. 46-51, *infra.*

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[9] This was in the early part of the opinion, in the context of summarizing the Unions' position. In the later context of its holding that the membership and not the employment relationship was centrally involved, the Court's words were, "there may have been violations of the Act * * *" (A. 100). Later in its opinion, in discussing the *Day* case, the Court below actually indicated there was no such unfair labor practice in this case as there was in *Day.* A. 106; see pp. 49-50, *infra.*

SUMMARY OF ARGUMENT

I.

The State Court Jurisdiction Is Pre-Empted Under the "Arguably" Protected or Prohibited Standard

The State Court had no jurisdiction to regulate this Union conduct, since: (A) the Union conduct involved in this case, procuring an employee's discharge under a union-security clause by advising the employer he has failed to tender the periodic dues uniformly required as a condition of retaining membership, is *certainly either protected or prohibited* under the Act; (B) this Court has clearly and consistently held that union conduct which is even *arguably* protected or prohibited under the Act is pre-empted; (C) this union conduct is routinely regulated by the Board; and (D) there is actual conflict between the regulation of this very Union conduct by the Board and by the Idaho Supreme Court.

A. 1. Respondent's employment relationship with Greyhound is the crux of this case. Respondent sued Greyhound and Petitioners originally, and persisted against Petitioners, only because his employment had been terminated. The critical union conduct involved in this case, the Union conduct which is bedrock to Respondent's claim for money damages, is the procurement of his discharge from Greyhound under the union-security clause in the collective bargaining agreement between Greyhound and the Union, by advising Greyhound he was delinquent in his dues. The question of whether he was delinquent under the internal Union rules is a subsidiary question; the ultimate issue is whether the Union obtained his discharge wrongfully.

All Respondent has ever wanted from this case is money, money principally as damages for loss of his Greyhound job. In the Complaint he filed and the case he made at trial, Respondent sought an amount of money derived from the fundamental theory of his case that he had become permanently unemployable, an amount which would have made his membership in the Union of Greyhound employees irrelevant. Restoration to Union membership was thus never sought by Respondent in his pleadings or at trial. He sought no relief in equity. On the actual record of the case, therefore, the crux of this case is the employment relationship rather than the union membership relationship. The union conduct involved in this case is interference with Lockridge's employment relationship by obtaining his discharge from Greyhound pursuant to the union-security clause, by advising Greyhound he had not timely tendered the periodic dues uniformly required as a condition of retaining membership in the Union.

2. This union conduct is certainly either protected or prohibited under the Act. Principally in § 8(b)(2) but in other provisions of the Act as well, Congress has expressly regulated the union conduct of procuring an employee's discharge under a union-security clause by advising the employer he has failed to tender the periodic dues uniformly required as a condition of retaining membership. By outlawing such conduct as a union unfair labor practice with the solitary exception of the case in which such a discharge is actually in fact and validity in law based upon a union-security clause in a collective bargaining agreement, Congress has blanketed *all* such discharges. All must necessarily be either protected or prohibited. There is no exception whatsoever. All such discharges are protected

only if they fall within the exception in the Act; otherwise, they are prohibited.

B. Under the pre-emption decisions of this Court, the State Courts have no jurisdiction to regulate conduct which is "arguably" either protected or prohibited activity under the Act. The potential conflict between the exercise of such State Court jurisdiction and the national labor policy as spelled out in the Act is too great, this Court has repeatedly and consistently held, to permit any exercise of State jurisdiction. This "arguably" touchstone was distilled by this Court in *Garmon* from the prior pre-emption cases. *Garmon* was intended to be a landmark case and indeed has been consistently followed and applied by this Court in subsequent cases.

Of those cases, the one closest to the instant one is *Borden*. In *Borden* and its companion case *Perko,* as in this case, the plaintiff was foreclosed from a particular job because the union believed he had violated an internal union rule. The plaintiff sued on claims identical to those involved in this case, tortious interference with employment rights and breach of the contract between the union and the member. The State trial courts overruled pleas of pre-emption in *Borden* and *Perko* and judgments for the plaintiff were affirmed by the State appellate courts. This Court reversed, however, on the basis of the *Garmon* rule. This Court held that under the allegations of plaintiff's complaint and the facts as found, the conduct was in violation of §§ 8(b)(1)(A) and 8(b)(2). Precisely the same analysis is clearly applicable to the instant case.

This Court went on to distinguish *Gonzales,* the case principally relied on by the Respondents in *Borden* and *Perko* as by the Respondent in this case, on the

ground that the crux of case was the employment relationship, whereas *Gonzales* had been involved with a purely internal union matter. In this case as in *Borden,* there was no specific equitable relief sought directed to Respondent's status in the Union. Accordingly, as there was no State remedy invoked there was no further remedy to "fill out"; and the State Court lacked jurisdiction.

Perko, a companion case to *Borden,* likewise involved a plaintiff who claimed the defendant union had interfered with his employment rights on the basis of applying a union rule, and had obtained a trial judgment against the union, which was affirmed on State appeal, despite the plea of pre-emption. As in *Borden,* this Court reversed the State judgment, distinguishing *Gonzales* and holding that the "arguably" rule of *Garmon* was indeed applicable under these circumstances.

In the *Day* case, the Oregon Supreme Court had before it precisely the conduct which is involved in this case; Elmer J. Day had been discharged by these Petitioners on the same date and for the identical Union dues delinquency as Respondent Lockridge. Unlike the Court below, however, the Oregon Supreme Court in *Day* followed *Garmon, Borden* and *Perko* and reversed a judgment for Day upon the basis of the pre-emption principles declared by this Court.

In order to reach its result favoring Respondent and to distinguish the decisions of this Court which were so plainly controlling, the majority opinion below was forced to adopt a sharply truncated view both of the actual record in this case and of the pre-emption decisions of this Court. Even beyond simply neglecting the plain fact that Respondent never requested restoration of Union membership or any other equitable relief,

the majority below blandly asserted that Respondent had been principally if not exclusively concerned throughout with restoration of Union membership. Moreover, the majority below presumed to distinguish *Garmon* because it involved picketing, which the majority characterized as a vital tool of labor and at the heart of the Act, whereas it declared the conduct involved in this case could not be so characterized. But this case involves the union-security clause, which is manifestly a vital tool of labor and one which Congress obviously regarded as at the heart of the Act, inasmuch as Congress comprehensively regulated such clauses in the Act.

Borden and *Perko* could be distinguished, the majority below asserted, because they did not involve membership rights but did involve a particular job. In truth, as the dissent pointed out, this case is identical to *Borden* and *Perko* in the State Court's reliance upon the contract between the union and the member; and this case obviously involves only one particular job, Lockridge's bus driving job with Greyhound. As the dissenting opinion made clear in its analysis of the development of the pre-emption principles by this Court, especially the landmark *Garmon* case and the definitive elucidations thereof in *Borden* and *Perko,* the true touchstone is whether the union conduct was at least arguably subject to the jurisdiction of the Board and to regulation under the Act. Under that touchstone, as the dissenting Judge held, this case was ended upon the majority's own recognition that the Union conduct at bar could certainly constitute an unfair labor practice under the Act. In a correct view of the law, the conclusion ineluctably follows that this case was pre-empted and there was no State Court jurisdiction over its subject matter.

C. The Union conduct involved in this case is the regular grist of the Labor Board mill in cases involving alleged violations of §§ 8(b)(2) and 8(b)(1)(A). In such cases, the discharged employee typically makes the identical claim presented by Respondent, that he did in fact and in law timely tender the periodic union dues payments uniformly required as a condition of retaining membership, and is therefore still a union member and in any event could not rightfully have been discharged. Conversely, in these Board cases, the unions invariably take the identical position Petitioners did in this case, that the individual who has lost his membership and his employment was actually delinquent in his dues payment, and was validly and legitimately discharged pursuant to the union-security clause in the collective bargaining agreement. In adjudicating such disputes in the multifarious §§ 8(b)(2)-8(b)(1)(A) cases coming before it, the Board necessarily and routinely takes evidence on and adjudicates the meaning and application of the internal union provisions and practices relating to dues and the provisions and practices under the union-security clause in the collective bargaining agreement, as well as all other issues pertinent to the ultimate conclusion of law as to whether or not the conduct was wrongful. In short, these plainly are the very issues of fact and of law which the State Courts presumed to regulate and adjudicate in this case. Manifestly, there could be no clearer example of potential conflict between State Court and Board than the subject matter of this case.

D. On the basis of an identical dues payment record, Petitioners sought and obtained the discharge of Elmer J. Day by Greyhound, at the same time and for the same union dues delinquency for which it sought the discharge of Wilson P. Lockridge. Day filed a Charge

with the Board. The Board dismissed his Charge on the ground that its investigation showed that no further proceedings were warranted. Necessarily, this reflected the administrative conclusion that dues delinquency had not been the cause of his discharge or that Day was in fact delinquent. In any event, the Board in effect found nothing wrongful about the self-same conduct by Petitioners upon which Respondent has recovered. Manifestly, there could be no clearer example of actual, and not only potential, conflict between State Court adjudication under State law and Board adjudication under the Act than this case.

II.

The State Court Jurisdiction Is Pre-empted Under the Occupation of the Field Standard.

A. Congress has occupied the field of discharges under a union-security clause by a union's claiming that the employee has failed to make timely tender of his union dues. For the reasons indicated above, this is clearly either protected or prohibited under the Act. There are no exceptions. There is no such case which lies outside of the field which Congress has regulated.

B. When Congress has occupied a field, it has foreclosed it to State regulation. In the labor field, this Court has enforced this Constitutional mandate with respect to peaceful strikes for higher wages. (*Automobile Workers* v. *O'Brien,* 339 U.S. 454 (1950); *Bus Employees* v. *Missouri,* 374 U.S. 74 (1963)), peaceful picketing (*Garner* v. *Teamsters Union,* 346 U.S. 485 (1953)), picketing specifically regulated by the Congress (*Teamsters Union* v. *Morton,* 377 U.S. 252 (1964)) and the right to bargain collectively (*Teamsters Union* v. *Oliver,* 358 U.S. 283 (1959); *Hill* v.

Florida, 325 U.S. 538 (1945)). The identical principle is controlling here. Consequently, the Idaho Courts had no basis for asserting jurisdiction compatible with the Supremacy Clause of the Constitution.

ARGUMENT

I. THE STATE COURT HAD NO JURISDICTION OVER THE UNION CONDUCT INVOLVED IN THIS CASE BECAUSE IT WAS CERTAINLY, AND A FORTIORI ARGUABLY, EITHER PROHIBITED OR PROTECTED UNDER THE ACT.

A. The Union Conduct in This Case Was Certainly Either Prohibited or Protected Under the Act.

1. The Union conduct in this case was the procurement of an employee's discharge under a union-security clause notifying the employer that he had not tendered the periodic dues uniformly required as a condition of retaining membership.

Throughout this case, Respondent concerned himself exclusively with the Union conduct of procuring his discharge under a union-security clause by notifying his employer, Greyhound, that he had not tendered the periodic dues uniformly required as a condition of retaining his membership in the Union. Respondent's solitary objective at the litigation table at which he elected to take a chance has been to win substantial money damages measured principally by the loss of his Greyhound employment.

In the Complaints he filed, including the Second Amended Complaint which was his trial pleading, the critical allegations were addressed to the employment relationship. The "conduct set out in the complaint" is of prime importance in determining whether the Board has jurisdiction so that pre-emption applies. *Radio Union* v. *Broadcast Serv.,* 380 U.S. 255, 257 (1965). In his complaints, Respondent recited the length of his employment and the earnings and benefits

accruing to him from his employment, for example, for these were allegations essential to his theory of actual damages. He asserted that his employment relationship was governed by a collective bargaining agreement between Greyhound and the Union providing for Union membership as a condition of employment, for this was a necessary element in his action deriving from his employment relationship. He detailed the events culminating in his discharge, the Union's finding he had not timely paid his October, 1959 dues, its requesting Greyhound to discharge him solely on this ground and Greyhound's discharging him solely at the request of the Union, for this Union conduct was the Union conduct for which he was seeking a money recovery gauged by loss of employment. He charged that the Union had treated him in an unprecedented, unique way, for this was critical to the concept of discriminatory treatment which was an essential ingredient of his theory of the case. His pleadings were focused squarely and solely upon the employment relationship. As Lockridge himself alleged and understood it, the crux of this case was the employment relationship.

As the District Court held in its opinion sustaining the motion to dismiss in 1961, in his original Complaint, which included Greyhound as a defendant, "the plaintiff several times alleged that all of defendants' acts were for the purpose of seeking discriminatory discharge by his employer. The gravamen, it seems to me, of his present pleading is the same, in that he alleged that the defendant union wrongfully expelled him for alleged failure to pay dues; that as a result of his expulsion he lost his employment with Greyhound Corporation and to his damage. There is a clear inference that the union did this to make an

example of him and to cause him to lose his employment, rather than to collect dues." A. 24.

To establish his case that the Union had caused his loss of employment, Respondent was required to have the Court interpret and apply the collective bargaining agreement which established the terms and conditions of his employment at the time he was discharged. His position that the language of that agreement was unambiguous was accepted by the Idaho District Court. This position and this acceptance were indispensable to his victory in this litigation. To be sure, Respondent likewise had to contend, and the State Court hold, that the International Union Constitution provisions about dues were unambiguous. But even the portion of those provisions about which the parties were in dispute related to the employment relationship (pp. 11-12, n. 6, *supra*). And the fact remains, ineradicable from the case, that the employment relationship was centrally involved, regardless of whether or the extent to which the membership relationship was also involved.

Lockridge himself patently did not direct this case to the membership relationship. In none of his Complaints was any equitable relief requested. His objective was money only. Never did he request restoration of his membership in the Union.

Because of the Idaho District Court's ruling that the collective bargaining agreement union-security clause, and also the collective bargaining union-security proviso of the International Union Constitution, were unambiguous, the trial was primarily devoted to damages rather than liability. Respondent's proofs of damages were derived exclusively from the employment relationship. The leading wit-

ness was the Greyhound driver who stood just below Lockridge on the Greyhound seniority roster at the time of the latter's discharge. This testimony was the foundation of the District Court's holding on damages. Thus the trial, like the pleadings and preliminaries, was concerned primarily if not exclusively with the employment relationship. Again, Respondent made no request for restoration of Union membership at the trial or in his Trial Brief, just as he had made none in his pleadings. His single objective, after trial as before, was to get money for himself out of the Union, not to get himself back in to the Union-member relationship.

Restoration of Union membership was never involved in this case, so far as Respondent himself was concerned. Its first appearance in this case was when the District Court granted that relief on its own initiative, expressly recognizing that it had not been requested. Transparently, the District Court, which believed it had no jurisdiction but had nevertheless been mandated by its State Supreme Court to assert jurisdiction, was striving to put the best legal face it could on its predicament. But its *ex post facto* decree could not transform the pleadings, the proofs, or the fixed realities of the case. As the District Court itself recognized at the very same time, this case did indeed inseparably involve the employment relationship and, accordingly, the only possible result conformable to the pre-emption decisions of this Court was that the Idaho District Court could not adjudicate this case because it lacked jurisdiction.

Evidently likewise recognizing that upon the real record in this case the District Court could not legitimately assert jurisdiction, the Supreme Court of Idaho

simply disregarded the record and attempted to transform this case sheerly by *ipse dixit*. The record belies the Court's naked assertion that "[t]he complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*," A. 99 (emphasis in original), an assertion which is fundamental to the basic predicate of the Court's entire majority opinion, that membership was the exclusive or principal purpose and nature of Lockridge's litigation, rather than money damages for loss of employment. Moreover, in view of the Complaints and the District Court opinions as they actually read, it required a temerity bordering on cynical or contemptuous consideration of and reaction against the pre-emption decisions of this Court for the Court below to incant in the inscription on the caption of the opinion below that this case is an "[a]ction by a former member of a labor union against the union for reinstatement to membership and for damages resulting from an improper discharge from membership." A. 89. The very phraseology, "discharge from membership," is patently contrived. Certainly, in common usage and particularly in this case, a "discharge" is from "employment" and the "damages resulting from an improper discharge" are a function of loss of employment compensation.

Not one word in the majority opinion below suggests that the Court knew or considered the fact that Respondent had never himself sought reinstatement to Union membership, but, rather, had consistently and unmistakably sought only money damages attuned to loss of employment. The truth is hardly affected by the felt need of the Court below to avoid mentioning or recognizing its plain existence. The fact is that the focus of this case is fixed firmly on the employment

relationship. The Union conduct for which Lockridge sought and obtained the money he desired—the Union conduct involved in this case—is the procurement of his discharge by Greyhound by advising it he had failed to tender the periodic dues uniformly required as a condition of retaining Union membership.

2. Such Union conduct is certainly either protected or prohibited under the Act.

The Union conduct involved in this case, procuring the discharge of an employee subject to a union-security clause by advising the employer that he is delinquent in his Union dues payments, is certainly either protected or prohibited under the Act, by virtue of the many express references to such conduct. The principal statutory provision involved is § 8(b)(2), 29 U.S.C. § 158(b)(2), which in pertinent part reads as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—* * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Subsection (a)(3), 29 U.S.C. § 158(a)(3), to which § 8(b)(2) thus makes reference, makes it an unfair labor practice for an employer:

> "* * * by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

The language of § 8(b)(2) thus embraces a particular subject—any discriminatory action against an employee for any reason other than his failure to pay uniformly required dues and initiation fees. It establishes two different unfair labor practices. The latter is more general. It covers *any* discrimination by a union against an employee with respect to whom membership has been denied on some ground *other* than his failure to tender the required dues.

The other facet of § 8(b)(2), set out in its initial language, embraces a union's attempting to cause an employer to discriminate against an employee in violation of § 8(a)(3) of the Act. Section 8(a)(3) in turn condemns any discrimination by an employer with regard to tenure of employment that encourages or discourages union membership (and a discharge based upon failure to pay dues certainly has an impact upon whether employees will seek or avoid union member-

ship), unless there is a valid union-security clause in effect, but provided that the employer does not have reasonable grounds for believing that the membership was denied for reasons other than the failure of the employee to tender the periodic dues.

Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), defines a broader unfair labor practice. Its more general language would embrace the particular conduct defined in § 8(b)(2) and a wide variety of other and unrelated conduct as well. In other words, not all violations of § 8(b)(1)(A) would be violations of § 8(b)(2). But all violations of § 8(b)(2) would be violations of § 8(b)(1)(A).

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section [7]: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

Section 7, 29 U.S.C. § 157, provides:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities *except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] of this title.*"

Pursuant to these provisions, Congress has imposed Federal regulation of *all* discharges under a union-

security clause caused by a union's asserting that the employee has failed to tender union dues. All such discharges are illegalized as unfair labor practices, with but a single exception. The discharge is legitimized only if it was in fact and in law in accord with a valid union-security clause.

Whenever the record shows that the employee has failed to tender his dues and he is actually and validly terminated for that reason under a union-security clause, the union conduct in obtaining the discharge is "protected" activity under § 7 of the Act, to the identical effect of any union action taken in observation and enforcement of a valid collective bargaining agreement. Whenever the record shows the employed is terminated for *any other* reason under a union-security clause, the union conduct involved is "prohibited" as an unfair labor practice under §§ 8(b)(2) and 8(b)(1)(A).

All cases must inevitably fall on one side or the other of the legal fence. Congress left no room for mugwumps. In all these cases under the Act, the dominant question is whether the union conduct in obtaining the discharge was actually in fact and validly in law on the ground of delinquency in dues payments. Based on the findings as to that issue, the case falls to the "protected" or to the "prohibited" side. The statutory provisions reading in terms of all such-and-such cases and all *other* cases ineluctably blanket the entire area of discharges under a union-security clause based on alleged failure to tender dues.

That the Act means what it says in covering all such cases was declared most clearly and authoritatively in *Radio Officers* v. *Labor Board,* 347 U.S. 17 (1954), the

leading interpretation of § 8(b)(2); the following discussion is the most pertinent:

> "Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The *only* limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if * * * 'membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.' *Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination.* This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for *any* purpose *other* than to compel payment of union dues or fees. * * * Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. *No other discrimination* aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned." *Id.* at 40-42.

Clearly, as a matter of establishing a properly balanced labor policy, after lengthy debates, Congress knowingly regulated all cases involving union conduct such as that at bar. There are no other possible categorizations of a union's procuring the discharge of an employee under a union-security clause by advising the employer he has failed to make timely tender and

has fallen into union dues delinquency. Such union conduct must perforce by the Congressional express prescriptions be certainly either protected or prohibited.

B. State Courts Have No Jurisdiction Over Union Conduct Which Is Arguably Either Protected or Prohibited Under the Act.

1. This Court has firmly established and followed the "arguably" rule.

There is no principle of Constitutional and labor law which this Court has set forth with greater clarity and consistency than the principle that State jurisdiction must yield where union conduct is even "arguably" subject to the jurisdiction of the Board, either as an activity which is protected, or an unfair labor practice which is prohibited, by Congress in the Act. This fundamental standard was clearly and definitively elucidated in *Garmon,* and has been consistently followed by this Court.

Garmon was plainly intended and recognized to be the Court's definitive statement of pre-emption principles. It established and explained the fundamental objective sought to be achieved in the prior pre-emption cases, and distilled from them the general rule which would determine future judicial decisions. The fundamental objective, the Court declared, was to eliminate "potential conflicts" which assertion of State jurisdiction might generate, "conflict with a complex and inter-related federal scheme of law, remedy, and administration." 359 U.S. at 242, 243.

To avoid such conflicts, "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the

method of regulation adopted. When the exercise of State power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Id.* at 243. Accordingly, the general rule to govern judicial decision in the future was thus stated: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted." *Id.* at 245.[10]

The Court emphasized that this general rule applied whatever State substantive or procedural law was brought to bear upon the activity. "Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Id.* at 244. Similarly, the Court declared, "Even the

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[10] The Court reiterated this rule in somewhat different phraseology in at least two other passages in *Garmon:*

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constituate an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law." 359 U.S. at 244.
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> "Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." *Id.* at 246.

States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Id.* at 247. The only exceptions to the rule were "where the activity regulated was merely peripheral concern of the Labor Management Relations Act" [11] and "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we would not infer that Congress had deprived the States of power to act." [12] *Id.* at 243-244.

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[11] The Court here cited *Gonzales*. The relationship between *Gonzales* and *Garmon* was clarified in *Borden* in terms which make it clear that this exception is not applicable to this case. See pp. 41-42, *infra*.

[12] At this point, the Court dropped a footnote citing *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958); *Youngdahl* v. *Rainfair*, 355 U.S. 131 (1957); *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266 (1956); and *Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1954). Subsequently, in the text of *Garmon*, this Court referred to these four cases as involving "conduct marked by violence and imminent threats to the public order" and held that "[s]tate jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, and the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Garmon*, 359 U.S. at 247; and see *id.* at 247-248. In this case, of course, there has been no violence or threats to the public order; the Union conduct involved has been utterly peaceful throughout.

Similarly, in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), the Court recognized " 'an overriding state interest' in protecting its residents from malicious libels", *id.* at 61; it held that "the malicious publication of libelous statements does not in and of itself constitute an unfair labor practice", *id.* at 63, and was careful to delimit "the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage", *id.* at 64-65, and to declare "[w]e apply the malice test to effectu-

The *Garmon* standard has been consistently adhered to by this Court. Many decisions have reiterated and applied its "arguably" touchstone: e.g., *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195 (1970); *Radio Union* v. *Broadcast Serv.*, 380 U.S. 255 (1965); *Hattiesburg Union* v. *Broome Co.*, 377 U.S. 126 (1964); *Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964); *Borden*, 373 U.S. 690 (1963); *Perko*, 373 U.S. 701 (1963); *Contruction Laborers* v. *Curry*, 371 U.S. 542 (1963); *Ex parte George*, 371 U.S. 72 (1962); *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173 (1962); *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498 (1959); *Plumbers' Union* v. *Door County*, 359 U.S. 354 (1959); see also, *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 375, 381, 383 n. 19, 385 (1969); *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 59 (1966); *Hanna Mining* v. *Marine Engineers*, 382 U.S. 181, 187-188 (1965); *In Re Green*, 369 U.S. 689, 692-693 (1962).

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ate the statutory design with respect to pre-emption." *Id.* at 65. In this case, the District Court did not find malice and awarded no punitive damages, but, rather, found that the Union had acted against Lockridge because of its construction of the requirement of the Union laws and the collective bargaining agreement. A. 53, 66. Unlike the malicious libel not covered by the Act in *Linn*, the loss of membership involved in this case is certainly of "relevance to the Board's function" and the Board can award damages, impose penalties and give related relief where, as here, the Union procures a discharge under the union-security clause. 383 U.S. at 63. The exercise of State jurisdiction would very much "interfere with the Board's jurisdiction over the merits of the labor controversy." *Id.* at 64.

Finally, inasmuch as the Board clearly had jurisdiction over this matter arising in the Greyhound bus driving employment which is obviously in interstate commerce, and the Board in fact took jurisdiction in the *Day* case and investigated Day's Charge (A. 14), this is at the polar extreme from a case in which there clearly is no Board jurisdiction. *Cf. Hanna Mining* v. *Marine Engineers*, 382 U.S. 181 (1965); *Incres S.S. Company* v. *Maritime Workers*, 372 U.S. 24 (1963); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963).

Only a few months ago this Court reaffirmed the *Garmon* principles. In holding that State jurisdiction was pre-empted, the Court reiterated yet again, "[t]he jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities which are 'arguably subject' to regulation under §7 or §8 of the Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959)." *Longshoremen* v. *Ariadne Co.*, *supra*, at 200.

2. The "arguably" rule governs this case.

a. Borden, Perko and Day demonstrate that the "arguably" rule governs this case.

Plumbers' Union v. *Borden*, *373 U.S. 690 (1963)*

Borden is the pre-emption decision of this Court which most clearly governs this case. The legal issues presented are identical in the two cases. The Court below recognized this in 1962 in citing the Texas State Court decision in support of its assertion of jurisdiction, albeit it currently purports to distinguish this Court's reversal of that Texas decision. Identically in both *Borden* and this case, plaintiff asserted that the union had acted wrongfully against him, tortiously interfering with his employment rights and breaching the contract of the union rules between himself and the Union;[13] the State Courts overruled pleas of pre-

[13] In *Borden*, the union rule forbade the member himself obtaining, rather than being referred through union procedures to, a job under the jurisdiction of a sister Local; in this case, of course, the Union rules related to dues and the Union's interference with plaintiff's employment rights was to procure his discharge from, rather than to preclude his obtaining, the one particular job involved. If this factual difference establishes any legal difference, it makes this an even stronger case for pre-emption than *Borden*, since discharges based on dues delinquency are expressly regulated by the Congress and the Board. See pp. 28-33, *supra*, and pp. 52-55, *infra*.

emption and asserted jurisdiction; and the State results were substantial money judgments for the plaintiffs affirmed by the State appellate courts.

In *Borden* as in all pre-emption cases after *Garmon,* this Court used *Garmon* as the springboard for decision. By virtue of *Garmon,* the Court declared, "the first inquiry, in any case in which a claim of federal pre-emption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." 373 U.S. at 694. Respondent and the Court below actually pay lip service to this *Garmon* test, but insist, as did Respondent and the Court below in *Borden* (*ibid.*), that the Union conduct here may not be asserted to be within Labor Board cognizance. This Court disagreed:

> "The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly 'arguable' that the Union's conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8(a)(3)." *Ibid.* (emphasis in original).

That holding governs this case precisely. Under the allegations of the Complaint and the facts found by the Idaho District Court, the Union business agent, with

the ultimate approval of Petitioners, refused to consider Respondent as having paid his dues timely, and this refusal resulted in Respondent's discharge from his Greyhound job. Beyond doubt, that refusal and the resulting discharge from employment "were in some way based on respondent's actual or believed failure to comply with internal union rules." Certainly Respondent's "actual or believed" dues delinquency was the trigger of the events which constitute his claim and proof in this case. Indeed, Respondent's claim and recovery is based upon the proposition that he was not *actually* in default of his dues, but was *actually* a member in good standing, although the Union *believed* that he had failed to make his critical dues payment within the time specified in the International Union Constitution and therefore had lost his membership in good standing. It makes no difference whether the Union was right or wrong in its belief that Respondent had failed to comply with its internal rules. For in either event—"actual *or* believed failure to comply with internal union rules"—the State Court cannot properly assert jurisdiction.

In this case, it is certain, not merely a "substantial possibility" as it was in *Borden,* "that [Respondent's] failure to live up to the internal rule * * * was precisely the reason why" he was discharged (*id.* at 695), and under the allegations of the Complaint and the finding of the District Court there is certainly—as the Court below itself explicitly conceded (A. 98)—and *a fortiori* "arguably" a violation of §§ 8(b)(1)(A) and 8(b)(2) of the Act. Inasmuch as Petitioners have always believed that Respondent was delinquent and therefore was properly discharged pursuant to a valid union-security clause, "[i]t may also be reasonably

contended that after inquiry into the facts, the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7." 373 U.S. at 695. Indeed, the repeated Congressional references to union-security clauses in the text and in the legislative history demonstrate that union conduct in conformity with the Act is quite clearly protected activity, at least to the same extent and degree as hiring halls. Obviously, the entire matter of requiring union membership to retain employment was (and remains) one of the most sensitive and bitterly contested in the entire area of labor relations in this country. "The problems inherent in the operation of" union-security clauses under the Act are just as "difficult and complex," see *infra*, pp. 52-55, as those inherent in the operation of hiring halls, and identically "point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency". *Id.* at 695-696.

In this pre-emption case as in *Borden* and the others, the only issue is the threshold issue of jurisdiction. Which tribunal shall decide the issues, the Board or the State Courts? Which shall determine how the union conduct shall legally be categorized, as prohibited, protected or otherwise; which tribunal shall read and interpret the collective bargaining agreement provisions and internal union documents, try the issues of fact and make findings; which tribunal shall ultimately decide whether the union conduct was rightful or wrongful, and if the latter, what are the appropriate remedies? To require the response that the Board is the proper tribunal, and the State Courts have no jurisdiction, this Court held in *Borden*, "[i]t is sufficient

for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction." *Id.* at 696.

In *Borden*, this Court squarely confronted the problem of reconciling the *Garmon* "arguably" standard with *Gonzales*. Respondent in *Borden*, like Respondent here, relied heavily upon *Gonzales*. *Ibid.* Respondent's position was that "restoration of union membership was a remedy that the Board could not afford and indeed that the *internal* affairs of unions were not in themselves a matter within the Board's competence." *Id.* at 696-697 (emphasis in original). But the Court rejected this position and distinguished *Gonzales* as follows:

> "The Gonzales decision, it is evident turned on the Court's conclusion that the lawsuit was focused on purely internal matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied. * * *
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> "*The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action * * * concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.*" *Id.* at 697.

By these touchstones, this case is manifestly governed by *Borden* and not by *Gonzales*. The Union's

procuring the discharge of Lockridge by Greyhound obviously dealt directly with Lockridge's employment, at least as directly as did the refusal of the Union to give Borden clearance. Accordingly, this lawsuit is not focused on purely internal matters. It is indeed focused principally, if not entirely, on the Union's actions with respect to obtaining Lockridge's discharge. That Lockridge himself so viewed his case is demonstrated by the fact that he himself never requested restoration of Union membership rights. He sought no equitable relief. Consequently, there was no State remedy to "fill out" by permitting the award of consequential damages. As certainly as in *Borden*, the "crux" of this action concerned Lockridge's employment relations and involved conduct arguably subject to the Board's jurisdiction.

This Court emphasized in *Borden* that:

> "It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in *Garmon, supra,* 359 U.S., at 246,
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> > '[o]ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to left unhampered.' (Emphasis added).
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> "In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." *Id.* at 698 (emphasis in original).

Accordingly, as in *Borden,* the judgment of the Court below must be reversed.

Iron Workers v. *Perko, 373 U. S. 701 (1963)*

Perko was a case companion to *Borden*. Perko also sued a union because of its interference with his right to obtain employment on the ground it believed he had violated a union rule. Perko likewise obtained a judgment which the State Court permitted to stand as against the plea of pre-emption; but this Court reversed. In *Perko* this Court re-emphasized the distinctions of *Gonzales* and the legal principle that the Board should adjudicate where the union conduct embraces employment consequences. "At the outset," this Court noted that "the rationale of the *Gonzales* case does not support state jurisdiction here" for the reasons set out in *Borden;* "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." 373 U.S. at 705.

Perko sought to avoid the force of the pre-emption principle by arguing that he was a foreman and thus not subject to the Act. The Court held, however, that he might well be an "employee" within the meaning of the Act; the Board should be given the initial opportunity to interpret the Act and determine whether he was an employee, and, even if he were not, to determine whether discrimination against him for the reasons indicated might violate the Act. If the Board were to find that he was covered by the Act, the Court held, "Perko's complaint—that the [Union] caused his discharge and prevented his subsequent employment * * * —falls within the ambit of the unfair labor practices prohibited by §§ 8(b)(1)(A) and 8(b)(2) of the Act." *Id.* at 706-707. Manifestly, in this case the Board had jurisdiction to determine Respondent's

"membership" status under the union-security provisions of the collective bargaining agreement and the International Union Constitution, for Respondent's complaint surely falls within the ambit of the union-security provisions of §§ 8(b)(1)(A) and 8(b)(2) of the Act prohibiting as an unfair labor practice a union's improperly obtaining an employee's discharge by advising the employer he had not timely tendered his union dues.

This Court reiterated in *Perko* that pre-emption is a threshold question of jurisdiction, to be decided prior to and distinct from the merits:

> "We do not of course intimate any view of the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be *Reversed.*" *Id.* at 708. (emphasis in original).
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> *Day* v. *Northwest Division 1055, et al., 238 Ore. 624, 389 P.2d 42 (1964), cert. denied, 379 U.S. 874 (1964)*

Day demonstrates that a State Supreme Court intending in good faith to comply with the letter and spirit of this Court's pre-emption decisions will clearly understand *Garmon, Borden* and *Perko.*

After the Board ruled he had no case against the Union, see pp. 55-58, *infra,* Day filed suit in the Oregon Courts. The Oregon trial court held it had jurisdiction, despite the plea of pre-emption, and Day recovered a substantial jury verdict. The Oregon Su-

preme Court reversed, holding that the case was indeed pre-empted and that the State Courts could assert no jurisdiction, primarily because such a result was held required to comply with this Court's decisions in *Borden* and *Perko*. 238 Ore. 624, 389 P.2d 42 (1964). Day petitioned for a writ of certiorari, contending that the Oregon Supreme Court misconceived the Federal law; but this Court denied the writ. 379 U.S. 878 (1964); No. 301, O.T. 1964.

In *Day* the Oregon Supreme Court held that, under the Act:

> "a union may lawfully require an employer to discharge an employe for a failure to maintain good standing in the union, when the union contract permits it, as in the instant case. If the request for discharge has been honest and for the actual reason assigned, the union and employer are within their rights and it is held that no unfair labor practice has occurred. But, if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights. The cases leave no doubt that the decision as to the true nature of the discharge is within the cognizance of the Board.
>
> "*Garmon, supra, Borden* and *Perko* all tell us that if the conduct alleged 'may reasonably be asserted to be subject to Labor Board's cognizance,' then the courts, both state and federal, are without any right to proceed. In this case the Board does reasonably have cognizance of the question at issue and we must desist from further proceedings." 238 Ore. at 627, 389 P.2d at 44.

Manifestly, there is irrepressible conflict between the Oregon judgment in *Day* and the Idaho judgment in

this case. While both decisions purport to apply the identical Federal law, pronounced in the identical decisions of this Court, to the identical union conduct, *Day* subordinates Oregon law to Federal jurisdiction, while the decision below renders Idaho law supreme over Federal law. *Day* is in allegiance to the pre-emption decisions of this Court. The decision below is in rebellion against them. There is only one resolution of this conflict which this Court can reach faithful to its own long-established and consistently pronounced pre-emption principles.

b. The efforts of the majority below to distinguish Borden, Perko and Day are unavailing.

To accomplish the result it desired in favor of Respondent Lockridge, the majority found it necessary to disregard or distort the record in this case, refuse to honor the pre-emption decisions of this Court both as to their general principles and their particular holdings, and arrogate for itself the role of ultimate arbiter of what was vital in the national labor policy and what could be disregarded therein.

The majority's characterization of this case as an "[a]ction by a former member of a labor union against the union for reinstatement to membership" (A. 89) simply disregards the pellucid fact of record that Respondent never sought reinstatement to membership; but, quite to the contrary, sought a lifetime income from Petitioners which would make Union membership an economic irrelevancy to him. A similar refusal to accept the Complaints as they were actually filed by Lockridge and appear in the record is reflected in the majority's assertion that "[f]rom the outset respondent attempted to regain his membership. * * * The

complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*. By his complaint he sought damages *and* equitable relief." A. 99 (emphasis in original). The persistently monocular perception of the record, shutting the one eye to "employment" and fixing the other on "membership" only, produced the assertion, "this case has been submitted and tried on the interpretation of the contract," signifying the membership and excluding the employment contract. A. 106. In any full and fair reading of the record, however, as the dissent pointed out, this was certainly an employment relationship case because all of the relief except restoration to union membership "necessarily had to turn on this Court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound. How could we award seniority rights and back wages to this plaintiff if we had not concluded that the union had not been acting in pursuance of a lawful union security agreement?" A. 124-125. The majority held that Lockridge should be "restored by the appellant union to full seniority rights" (A. 109), simply failing to recognize or mention that "seniority" has nothing to do with union membership and relates solely to length of *employment*. Indeed, as we have seen, the District Court held it lacked jurisdiction to award seniority for precisely this reason. A. 55. The majority's fundamental predicate that this case did not at all or significantly involve the employment relationship is utterly alien to the actual record in this case.

The majority's refusal to honor the general principles of the pre-emption decisions of this Court is demonstrated, as noted above, by its simultaneously acknowledging both that under those decisions there

is no State jurisdiction where the union conduct is "arguably" protected or prohibited under the Act and that the union conduct in this case was prohibited under the Act—and yet insisting upon asserting Idaho Court jurisdiction! The Court below in particular refused to follow *Borden* and *Perko*. In those cases, the Court said, there had been no denials of membership (A. 105); the Court below did not explain what relevancy this had, since its opinion demonstrates it was relying upon the contract between the member and the union, the identical contract upon which the State Courts had relied, but this Court had rejected, as a basis for asserting State jurisdiction in those cases. There was no response in the majority opinion to the dissent's analysis that "[t]hose cases did not turn on the fact of membership or non-membership in the defendant union. The touchstone in each of those cases was a denial of the rights of a union member which effectively caused that member to be deprived of employment which he otherwise had." A. 123-124.

The majority below also proffered as a distinction that in both *Borden* and *Perko* "the individuals complained that they had been denied the benefits of a *particular* job." A. 105 (emphasis in original). The majority opinion itself refers to only one particular job in this case, which certainly involves only one particular job, Lockridge's bus driving job with Greyhound. Finally, the majority stated, "*Borden* involved 'difficult and complex problems inherent in the operation of union hiring halls' while *Perko* presented 'difficult problems of definition of status and coercion * * * of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." A. 106. The Court below made no comment whatever on this, apparently unable to suggest

any answer to the question why the application of union-security clauses and the definition of the "membership" statuts thereunder did not present "difficult and complex problems", those "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." In fact, as the dissent made clear, "[t]he problems of interpretation of the union charter and the bargaining contract here are no less difficult than are some of the 'problems of definition' consigned to the Board in *Perko*. It is not, despite the *ipse dixit* of the majority, 'obvious * * * that Lockridge was *not* subject to suspension or dismissal.' " A. 125 (emphasis in original).

The majority below acknowledged that "[t]he result we reach is contrary to that reached in *Day* v. *Northwest Division 1055, et al.*, 389 P.2d (1964)." A. 106. It sought to distinguish *Day* on the ground that "there is a specific finding of discrimination on the part of the union" in that case whereas "[t]here was no such finding in this case * * *." *Ibid.* The Court cites no authority, and there would appear to be none, for the assertion that there was any specific finding of discrimination in *Day*. Moreover, the assertion that there is no such finding in this case must be bottomed upon the extraordinary notion that a finding of disparity of treatment is not a finding of discrimination. According to both the allegations of the Complaints and the Findings of the District Court, Petitioners had treated the dues and employment status of Respondent in a unique and unprecedented way as compared to others in the identical position. A. 17-18, 46-47, 60-61, 64-65. Indeed, as the treatment Petitioners afforded both Day and Lockridge is identical, it is obvious that the significant facts as to disparity of treatment and discrimination are identical in the two cases. Both men alleged

and proved they were treated differently from other members in the identical dues and employment status. In any event, the Court below itself undermined any distinction between the two cases based upon the presence or absence of discrimination, by acknowledging that "the Board might find an unfair labor practice in *both* an underlying 'discriminatory' motivation and an honest misunderstanding of the contract * * *." A. 106. Consequently, the majority's attempted distinctions from *Day* cannot survive analysis.

As if these fallacies in its opinion were insufficiently egregious, the majority below obviously regarded itself as having the power and responsibility independently to appraise the various facets of the national labor policy, and to segregate what was important and therefore pre-empted from what was less important in its view and therefore susceptible to its regulation. Its appraisal enabled it to proffer a distinction between *Garmon* and this case, that *Garmon* "involved conduct which represented one of the vital tools of organized labor and a protected right for all employees—picketing[,] * * * the most fundamental aspects of concerted action, the very heart of the national labor policy, over which the regulation of the Board has never been questioned. Here the conduct centers on membership rights in the union, critical from an individual member's viewpoint, but conduct, excluded from the operation of the Act." A. 102, 105.[14] The Court did not even assay any

[14] The Court below did not originally follow the pre-emption precepts even as to picketing; its conversion to the view it now espouses required the ministrations of this Court. *Retail Clerks International Association, Local No. 560* v. *J. J. Newberry Company*, 352 U.S. 987 (1957), *summarily reversing* 78 Idaho 85, 298 P.2d 375 (1956); *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.*, 352 U.S. 884 (1956), *summarily reversing* 77 Idaho 514, 297 P.2d 519 (1956).

elucidation of why union security is not one of "the vital tools of organized labor or one of "the most fundamental aspects of concerted action", nor why the entire matter of union-security provisions and their application, so extensively and expressly regulated by the Congress, did not involve "the very heart of the national labor policy * * *." Perhaps the Court had not examined the whole body of that policy. Certainly the competent diagnosis of that policy as it is administered in day-to-day life is that the regulation of the Board has indeed never been questioned with respect to union-security matters which may center on membership rights in the union but certainly are not excluded from the operation of the Act. See pp. 52-55, *infra*. Why membership rights are "critical from an individual member's viewpoint" except for the impact on employment, which the Court hardly saw as involved in this case, the Court below did not explain. While the majority presumed to rank the various aspects and organs of the national labor policy so that it could assert jurisdiction over and cut off in its surgery whatever it might opt to regard as less important or less vital, the dissent took the position that "it is not for us to decide if our intrusion into the regulation of this conduct will '* * * militate in favor of the basic purpose for which national labor law was created.' That determination, no matter what may be our own view of our competence, has been taken from us and vested wholely in the expert N.L.R.B., as a matter of federal law * * *." A. 125. By the force of *Garmon, Borden* and *Perko,* and *Day* as well, this judgment was manifestly correct and the majority's clearly in error.

C. This Union Conduct Is Routinely and Normally Adjudicated by the NLRB Which Considers and Decides the Very Issues Presumed To Be Considered and Decided by the State Courts in This Case.

It is the Board, and not the State Courts, which routinely and normally regulates the Union conduct involved in this case, a union's procuring an employee's discharge pursuant to a union-security clause in a collective bargaining agreement. It is the Board, and not the State Courts, which adjudicates the controversy, which tries the facts and makes the ultimate determination of law as to whether the union conduct has been proper or improper, and what remedy, if any, shall be provided. This is demonstrated by the plethora of Board cases involving such union conduct under § 8(b)(2) and related provisions of the Act.[15] In virtually all of them, the union's advising the employer that the employee is delinquent in his dues payments and has thus surrendered his union membership under the union's internal rules is the cause of the resulting loss of employment.[16] To adjudicate whether

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[15] For a complete catalogue of the cases, see, e.g., American Digest System, Labor Relations, Key Numbers 368, 395 (West Publishing Company); Cumulative Digest and Index, LRRM, §§ 59.230-59.231 (Bureau of National Affairs); Labor Law Reporter Par. 4525 (Commerce Clearing House).

[16] The union conduct of causing a discharge for dues delinquency is presumptively a violation of the Act; showing that the statutory exception is applicable—that the discharge was in fact for failure to tender the uniform periodic dues and was in compliance with a valid union-security clause—is a matter of affirmative defense. See, e.g., *Local 545, Operating Engineers*, 161 NLRB 1114, 1119 (1966); *Marble Polishers, Etc., Local No. 121*, 132 NLRB 844 (1961); *Local 84, International Ass'n. of Bridge*, 129 NLRB 971 (1960). Moreover, the burden of proof on the issue

or not an unfair labor practice has been committed, the Board must determine the actual dues status of the member and its application to his employment status under the collective bargaining agreement; and thus must invariably investigate and interpret the pertinent union dues rules and practices and the pertinent provisions of the agreement—precisely the same matters

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of whether an action which would otherwise violate § 8(b)(2) is made lawful and protected by the proviso is on the party accused of the violation. See, e.g., *Local 545, Operating Engineers, loc. cit. supra; Operative Plasterers, Etc. Local No. 2,* 149 NLRB 1264, 1281-1282 (1964). In a case where dues payments are contested, the Board must first consider, in a case of this sort, "whether the dues delinquencies existed in fact." *United Sugar Workers Union, Local 9,* 149 NLRB 154, 160 (1964). As was held in *International Union of Electrical, R. & M. Wkrs.* v. *N.L.R.B.,* 113 U.S. App. D.C. 342, 347, 307 F.2d 679, 684 (1962), *cert. denied,* 371 U.S. 936 (1962) (emphasis in original), "the Board was not required to make an *affirmative* determination that all or any of these factors [personal hostility] comprised the actual basis or motivation for the Union's demand for [the employee's] discharge. No affirmative finding as to the cause of discharge is needed. Under the language of the statute the Union commits an unfair labor practice when it causes an employer to discriminate against an employee 'on some ground *other than* his failure to tender the periodic dues and the initiation fees uniformly required • • •.'" Indeed, even if the employee was in fact delinquent, the Union has the additional obligation of showing that it fully apprised him of hs dues status. See, e.g., *N.L.R.B.* v. *Operating Engineers, Local 139,* — F.2d —, 73 LRRM 2842, 2844 (7th Cir. 1970); *N.L.R.B.* v. *Local 182, International Bro. of Teamsters,* 401 F.2d 509 (2nd Cir. 1968), *appeal dismissed and cert. denied,* 394 U.S. 213 (1969); *N.L.R.B.* v. *Hotel, Motel and Club Employees' Union, Local 568,* 320 F.2d 254 (3rd Cir. 1963); *International Union of Electrical, R. & M. Wkrs.* v. *N.L.R.B., supra; Retail Store Employees Union, Local No. 655, AFL-CIO,* 180 NLRB No. 157 (1970); *Local 545, Operating Engineers, supra,* at 1120-1121. *Cf. N.L.R.B.* v. *Zoe Chemical Co.,* 406 F.2d 574 (2nd Cir. 1969).

which the State Courts adjudicated in this case.[17] Manifestly, the substantive issues in this case would present only an ordinary, run-of-the-mine §§8(b)(2)-8(b)(1)(A) case to the Board. The legal characteristics of this case are homogeneous with these Board

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[17] Even the majority below recognizes that *Krambo Food Stores, Inc.*, 114 NLRB 241 (1955), *enforced sub. nom. N.L.R.B.* v. *Allied Independence U.*, 238 F.2d 120 (7th Cir. 1956) was an illustration of the Board's concerning itself with the very issues of interpretation of a Union Constitution with which the State Courts were here concerned. A. 98. The Board in *Krambo*, after considering the Union Constitution and practice, found that the member employees had indeed paid dues within the time allowed by the Union Constitution; and concluded:

> "As the complainants were discharged during the 30-day grace period at the request of the Union, their discharge constituted a discriminatory denial to the complainants of the grace period allowed them for the payment of dues by the Union's constitution.
>
> "Accordingly, we find the Respondent Union violated Section 8(b)(2) in that it did cause the Respondent Company to discriminate against employees [named] by terminating their employment on some ground other than the failure to tender the periodic dues uniformly required as a condition of retaining membership in the Union." 114 NLRB at 243-244.

Additional cases in which the Board interpreted dues provisions of the Union Constitution and the Union practices in connection therewith in applying § 8(b)(2) include: *N.L.R.B.* v. *Leece-Neville Company*, 330 F.2d 242 (6th Cir. 1964), *cert. denied*, 379 U.S. 819 (1964); *N.L.R.B.* v. *Shear's Pharmacy, Inc.*, 327 F.2d 479 (2nd Cir. 1964); *N.L.R.B.* v. *Spector Freight System, Inc.*, 273 F.2d 272 (8th Cir. 1960), *cert. denied*, 362 U.S. 962 (1960); *Communications Workers of America* v. *N.L.R.B.*, 215 F.2d 835 (2nd Cir. 1954), *enforcing New Jersey Bell Telephone Company*, 106 NLRB 1322 (1953); *Local Union No. 703, Laborers' International Union*, 181 NLRB No. 140 (1970). Likewise, the Board has reviewed minutes of Union meetings, transcripts of internal Union hearings and like evidence, in relation to dues delinquency problems under the Act: e.g., *Tracy Towing Line, Inc.*, 166 NLRB 81 (1967), *enf'd sub nom., N.L.R.B.* v. *United Marine Div., Local 333, Na-*

cases. There is no unique attribute of the circumstances at bar which can justifiably segregate this case from the routine §§8(b)(2)-8(b)(1)(A) Board case.

Accordingly, this is the most glaring possible State Court violation of the *Garmon-Borden-Perko* preemption principles declared by this Court. Vindication of those principles, of bedrock import in the Federal System, demands reversal.

D. There Is Actual Conflict Between the Board's View and the State Court's View of the Union Conduct in This Case.

At the same time that they caused Greyhound to discharge Lockridge, Petitioners caused the discharge of another Greyhound driver, Elmer J. Day, for the identical Union dues delinquency. In fact, the Union requested the discharge of both Day and Lockridge in the same letter to Greyhound. A. 82. Lockridge indicated he and Day were "singled out" because they had withdrawn themselves from the check-off. A. 77. The District Court's unchallenged finding on this record was, "One Elmer Day was likewise suspended under *identical circumstances.*" A. 60. The Court below conceded, "[t]he result we reach is contrary to

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tional Mar. U., 417 F.2d 865 (2nd Cir. 1969), *cert. denied*, 397 U.S. 1008 (1970); *United Brewery Workers*, 166 NLRB 915 (1967).

Cases involving the timeliness of tender, an issue which evidently concerned the Court below (A. 108), likewise present factual and legal issues akin to those presented in this case. See, e.g., *N.L.R.B.* v. *Food Fair Stores, Inc.*, 307 F.2d 3 (3rd Cir. 1962); *General Motors Corp., Packard Electric Division*, 134 NLRB 1107 (1961).

A union's good faith belief that its action is proper under the collective bargaining contract is no defense to this charge of unfair labor practice. See, e.g., *Local 140*, 109 NLRB 326, 328-329 (1954); *Plywood Workers Local Union No. 2498*, 105 NLRB 50, 55-56 (1953).

that reached in Day v. Northwest Division 1055, et al., 389 P.2d 42 (1964)." A. 106.

Unlike Lockridge, Day did first file a charge against the Union with the Board.[18] After investigation, the Board dismissed the charge because there was "insufficient evidence of violations * * *." A. 13-14. Inasmuch as the critical facts, the timing of the dues payments and the wording of the dues provision in the International Union Constitution and union-security clause in the collective bargaining agreement, were identical in the two cases, and inasmuch as it would appear crystal clear that the facts alleged by Lockridge and found by the Idaho District Court would constitute an unfair labor practice under §§ 8(b)(2) and 8(b)(1)(A) of the Act, the only possible explanation for the Board's refusal to proceed in the *Day* case is that the Board, on the basis of its own investigation, found the facts to be different from those alleged and found in the present case. In other words, the Board must have found either (1) that the suspension of Day's Union membership was *not* inconsistent with the Union's Constitution or (2) that Day's discharge was *not* related to his loss of Union membership. Only by

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[18] Obviously, the Board provided a forum to Lockridge to adjudicate whether the Union conduct involved in his case was protected or prohibited. See pp. 52-55, *supra*. Manifestly, this is not a case in which Congress "has provided no remedy" or in which, "if the states were pre-empted from acting, there would be an absence of any legal remedy." *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 227-228 (concurring opinion) (1970). This is indeed a case where the Act "provided an effective mechanism whereby an [employee] could obtain a determination from the National Labor Relations Board as to whether [the union conduct involving him] is protected or unprotected * * *." *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195, 201 (concurring opinion) (1970).

making one or both of these findings could the Board have concluded that there was "insufficient evidence of a violation."[19] On the other hand, Lockridge alleged, and the State Courts below found, that Petitioners were liable, because of the precisely contrary contentions and findings—both (1) that the suspension of Lockridge's Union membership *was* inconsistent with the Union's Constitution, and (2) that Lockridge's discharge *was* related to his loss of Union membership. Only by making these findings, contrary to what the Board must have found in *Day* and would presumably have found here, could the District Court below have concluded that Respondent had proved his claims and that Petitioners were liable.

The short of the matter is that the Board evidently concluded that Petitioners had acted lawfully, while the Idaho Courts concluded that they had acted un-

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[19] "In addition, when the Board has actually undertaken to decide an issue, the litigation in a state court creates more than theoretical danger of actual conflict between state and federal regulation of the same controversy." *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 185 (1962). Furthermore, even if the refusal to issue a complaint be thought not to be a disposition on the merits, that would not authorize the State Courts to act. "In [*Guss* v. *Utah Labor Relations Board*, 353 U.S. 1] we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that on activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to State jurisdiction. • • • The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Garmon*, at 246.

lawfully. There could hardly be a more vivid illustration of *actual* conflict between Federal and State authority which it is the very purpose of the pre-emption doctrine to avoid.

II.

THE STATE COURT HAD NO JURISDICTION OVER THE CONDUCT INVOLVED IN THIS CASE BECAUSE CONGRESS HAS COMPREHENSIVELY REGULATED AND THUS FORECLOSED IT FROM STATE COURT JURISDICTION.

A. Congress Has Regulated All Discharges Under a Union-Security Clause Procured by a Union's Claim That an Employee Has Not Timely Tendered the Periodic Union Dues Uniformly Required as a Condition of Maintaining Membership.

In demonstrating that the Union conduct in this case was certainly either protected or prohibited under the Act, see pp. 28-33, *supra,* we established that the field of Union conduct involved in this case, the procuring of an employee's discharge under a union-security clause by a union's advising the employer that the employee has not timely tendered the periodic union dues uniformly required as a condition of retaining membership, has been comprehensively regulated by the Congress. The entire catalogue of cases involving this particular type of union conduct has been regulated by Congress in the Act. There are no exceptions. We need not reiterate the discussion, but we would reemphasize it at this point because of its crucial significance in the instant context.

B. By Its Comprehensive Regulation of This Union Conduct, Congress Has Precluded the Exercise of State Jurisdiction Over It.

In deciding whether State jurisdiction may be exercised over union conduct, separate and apart from any inquiry as to whether the "arguably" standard is ap-

plicable, "it is still necessary to determine whether * * * 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien,* 339 U.S. 454, 457." *Teamsters Union* v. *Morton,* 377 U.S. 252, 258 (1964).

In *Automobile Workers,* the Court was concerned with strikes in interstate commerce, and in particular peaceful strikes for higher wages. It held that the Act prohibited "concurrent state regulation" of this field. *Automobile Workers* v. *O'Brien,* 339 U.S. 454, 457 (1950). The Court reaffirmed this holding when a State sought to justify regulation of such strikes on the ground that the industry involved was a public utility. *Bus Employees* v. *Missouri,* 374 U.S. 74 (1963).

In the *Morton* case, the Court reversed a verdict obtained under § 303 of the Act, 29 U.S.C. 187. This Section provides for the recovery of damages for union conduct which is an unfair labor practice under § 8(b)(4) of the Act. Congress obviously knew how to permit damage lawsuits for unfair labor practice conduct, when it intended to do so. In *Morton,* there was proof of some union conduct violating § 303. Because jurisdiction thus attached, the lower Federal courts believed they had jurisdiction also to try other union conduct under State law; and recovery was granted on that theory. This Court reversed, however, holding that the scope of jurisdiction for courts and of recovery for plaintiffs was circumscribed by the explicit Congressional regulation. "The type of conduct to be made the subject of a private damage action was considered by Congress, and § 303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.' *Local 1976* v. *Labor Board,* 357 U.S. 93, 98." 377 U.S.

at 258. The essence of the Court's holding was expressed as follows: "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the Congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Id.* at 259-260. Identically, in this case, if the Idaho judge-made law of tort and union-member contract recovery can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted §§ 8(b)(2) and 8(b)(1)(A), the inevitable result would be to frustrate the Congressional determination to leave this weapon of discharges under valid union-security clauses available, and to upset the balance of power, with respect to union-security clauses and thus generally, between labor and management expressed in our national labor policy.

While the *Morton* case dealt in particular with the field of secondary boycott activity condemned by § 303, State jurisdiction has been struck down also in the more general field of peaceful picketing in a manner and for objectives not prohibited by the Congress. The Court expressed this quite clearly in the following oft-cited passage in *Garner* v. *Teamsters Union,* 346 U.S. 485, 499-500 (1953):

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall

> within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits."

The parallelism to this case is manifest. For Idaho to impinge upon the area of application of union-security clauses which Congress permitted to be executed and enforced is quite as much an obstruction of Federal policy as if the State were to permit a union shop, or a union-security clause valid in less than 30 days, or otherwise to sanction the application of union-security clauses for purposes or by methods which the Federal Act prohibits.

Moreover, inasmuch as the Act protects and encourages collective bargaining and seeks to prevent labor disputes by promoting their settlement through collective bargaining culminating in the execution of an agreement which will contain such provisions as the employer and the union may desire, the Court has struck down official action, State or Federal, which it regarded as in actual or potential conflict with that basic general Congressional purpose. See, e.g., *Teamsters Union* v. *Oliver,* 358 U.S. 283 (1959), where the application of the Ohio antitrust law was struck down because its effect would outlaw wage agreements reached in consonance with the Act; and *Burlington Truck Lines* v. *U.S.,* 371 U.S. 156 (1962), where the grant of a certificate of convenience by the Interstate Commerce Commission was remanded so that the Commission could consider the impact of Federal labor legislation.

Further, in the field of the general regulation of labor relations under State Labor Relations Acts, the Court has held that State jurisdiction may not be exercised over any area covered by the Federal law. *Guss* v. *Utah Labor Board,* 353 U.S. 1 (1957). "Congress has expressed its judgment in favor of uniformity." *Id.* at 10-11.

Other examples of attempted State regulation of industrial relations which have been struck down on the ground that Congress occupied the particular field include: application of an unemployment compensation statute to deprive an employee of such benefits as a consequence of filing a Charge with the Board, *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235 (1967); attempted regulation of foremen at a time when they were subject to Federal labor legislation, *Bethlehem Co.* v. *State Board,* 330 U.S. 767 (1947); requiring registration and licensing in order to engage in activity protected or permitted by the Federal Act. *Hill* v. *Florida,* 325 U.S. 538 (1945).

The Act is "of course the law of the land which no state law can modify or repeal," *Nash* v. *Florida Industrial Comm'n, supra,* at 238, "[a] national system for the implementation of this country's labor policy * * *," *id.* at 239, a national system of substantive law and, in addition, prescribing a "centralized administration of specially designed procedures [which Congress considered] was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Garner* v. *Teamsters Union,* 346 U.S. 485, 490 (1953).

The decision below purports to accomplish precisely that which Congress and this Court had forbidden, dif-

ferent labor policies and labor laws being enforced throughout the land, emanating from the varying local attitudes towards labor controversies, thwarting uniform administration and enforcement of the national system for the implementation of this country's labor policies. In short, Idaho is here seeking to secede from that national system. A State Supreme Court decision thus according supremacy to State over Federal law is at war with the mandate of the Supremacy Clause that Federal law shall be accorded to sovereign rank throughout the United States. It cannot survive.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed and the cause remanded with direction to dismiss this action.

Respectfully submitted,

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STATUTORY APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution: Supremacy Clause

Article VI, Section 2 of the Constitution of the United States reads in pertinent part as follows:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

National Labor Relations Act: Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2)

The pertinent statutory provisions are the following, in the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*:

Section 7, 29 U.S.C. § 157, provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] of this title."

Section 8(a)(3), 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer:

> "by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * * : *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section [7]: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

Section 8(b)(2), 29 U.S.C. § 158(b)(2) provides in pertinent part as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—* * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."